



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 217

[Docket DARS-2019-0004]

RIN 0750-AJ72

Defense Federal Acquisition Regulation Supplement:

Unfinitized Contract Actions (DFARS Case 2018-D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018. This rule revises requirements for definitizing unfinitized contract actions.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 84 FR 4429 on February 15, 2019, to implement section 811 of the

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 and section 815 of the NDAA for FY 2018. Section 811 modifies restrictions on undefinitized contractual actions (UCA) regarding risk-based profit, time for definitization, and Foreign Military Sales. Section 815 establishes limitations on unilateral definitizations of UCAs over \$50 million. Three respondents provided public comments in response to the proposed rule.

II. Discussion and Analysis

A. Summary of Significant Changes from the Proposed Rule

There are changes to the definition of "qualifying proposal" at 217.7401 as a result of public comments. In addition, DoD has delegated some authorities to the head of the contracting activity.

B. Analysis of Public Comments

1. Support for the rule

Comment: One respondent stated unqualified support for the rule.

Response: Noted.

2. Timely definitization

Comment: One respondent indicated that the proposed rule impedes the ability of contracting officers to definitize UCAs timely and recommended that the rule be rescinded. The respondent asserted that the application of a higher profit

factor after receipt of the qualifying proposal but prior to definitization of the UCA encourages contractors to stall until after the 180-day window has closed, since most contractors are motivated by profit.

Response: This rule modifies the requirements on UCAs related to the calculation of risk-based profit objectives. The language at DFARS 215.404-71-3(d)(2)(i) regarding profit allowed on the contract when a contracting officer definitizes the contract after the end of the 180-day period is consistent with section 811 of the NDAA for FY 2017. However, when definitizing within the 180-day period, the requirement for the contracting officer to assess the extent to which costs have been incurred prior to definitization when determining contract type risk remains unchanged in this rule. When costs have been incurred prior to definitization, DFARS 215.404-71-3(d)(2)(i) states the contracting officer generally regards the contract type risk to be in the low end of the designated range. As such, this rule encourages submission of timely qualifying proposals by contractors and timely definitization by contracting officers.

3. Unilateral definitization

Comment: One respondent indicated that restricting the authority of a contracting officer to unilaterally definitize a UCA with a value greater than \$50 million without the service acquisition executive for the military department approval

ensures the UCA will not be definitized within the 180 day window. The respondent also stated that requiring the contracting officer to provide the written approval to the contractor implies that leadership does not trust the contracting officer to be truthful.

Response: The language at DFARS 217.7404(b)(2) and (3) regarding the limitations on unilateral definitization of UCAs over \$50 million is a statutory requirement under 10 U.S.C. 2326(c) and is consistent with section 815 of the NDAA for FY 2018. The rule provides greater oversight on UCAs over \$50 million in accordance with Congressional intent as set forth in statute.

4. Definition of "qualifying proposal"

Comment: One respondent indicated that their central contention with the proposed rule is the incomplete revision of the definition of "qualifying proposal" at DFARS 217.7401(c) to match the statutory revisions of the definition at 10 U.S.C. 2326(g)(2). The respondent also recommended that DoD establish that a proposal submitted in compliance with the Proposal Adequacy Checklist shall be deemed a "qualifying proposal."

Response: DoD has revised the definition to conform to the statutory definition as follows: "Qualifying proposal" means a proposal that contains sufficient information to enable DoD to conduct meaningful analyses and audits of information contained

in the proposal. Although compliance with the proposal adequacy checklist forms a good basis for an adequate proposal, it does not necessarily ensure that the proposal contains sufficient information to enable DoD to conduct meaningful analyses and audits of information contained in the proposal.

C. Other Changes

- At DFARS 217.7401, an editorial change removes paragraph number designations from the definitions.
- At DFARS 217.7402(b), an editorial change updates the titles and address for the Principal Deputy, Defense Pricing and Contracting (Contract Policy).
- At DFARS 217.7404(a), DoD specified the head of the contracting activity as the authority to waive the requirements with regard to entering into a UCA for a foreign military sale.
- At DFARS 217.7404(b)(2), DoD delegated to the head of the contracting activity, without power of redelegation, the authority to approve a unilateral definitization.
- At DFARS 217.7404-3, DoD delegated to the head of the contracting activity, without power of redelegation, the authority to extend the definitization schedule beyond an additional 90 days.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify requirements on undefinitized contract actions (UCAs) regarding calculations of risk-based profit objectives, timing for definitizations, Foreign Military Sales, and limitations on unilateral definitizations of UCAs over \$50 million, in accordance with recently enacted statutory requirements. The objective is to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, and section 815 of the NDAA for FY 2018.

There were no issues raised by the public in response to the initial regulatory flexibility analysis.

The rule applies to all entities who do business with the Federal Government, including over 327,458 small business registrants in the System for Award Management database. However, DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule is primarily implementing internal DoD administrative requirements. With regard to potential profit impacts, DoD estimates that this rule will impact approximately 470 contracts per year, primarily awarded to other than small

entities, where definitization is extended beyond 180 days after receipt of a qualifying proposal. This would equate to less than 1/10th of one percent of contracts awarded to small entities.

The rule does not include additional reporting or record keeping requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the rule to accomplish the desired objective of the statute. We do not expect this rule to have a significant economic impact on a substantial number of small entities because the rule is not implementing any requirements with which small entities must comply.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215 and 217

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 217 are amended as follows:

1. The authority citation for 48 CFR parts 215 and 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215-CONTRACTING BY NEGOTIATION

215.404-71-2 [Amended]

2. In section 215.404-71-2 paragraph (e)(2)(iii), remove "217.7401(c)" and add "217.7401" in its place.

3. In section 215.404-71-3, revise paragraph (d)(2)(i) to read as follows:

215.404-71-3 Contract type risk and working capital adjustment.

* * * * *

(d) * * *

(2) * * *

(i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a) and 243.204-70-6). When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as zero percent, regardless of contract type. However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract

after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal (as defined in 217.7401), the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

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PART 217—SPECIAL CONTRACTING METHODS

4. Amend section 217.7401 by-

a. Removing the alphabetical paragraph designations for each definition and arranging the definitions in alphabetical order;

b. In the definition for "Contract action", paragraph (3), removing "Subpart 217.77" and adding "subpart 217.77" in its place; and

c. Revising the definition of "Qualifying proposal" to read as follows:

217.7401 Definitions.

* * * * *

Qualifying proposal means a proposal that contains sufficient information to enable DoD to conduct meaningful analyses and audits of the information contained in the proposal.

* * * * *

5. Amend section 217.7402 by-

- a. Removing paragraph (a)(1);
- b. Redesignating paragraphs (a)(2) through (4) as paragraphs (a)(1) through (3);
- c. In redesignated paragraphs (a)(1) and (2), removing the semicolons and replacing them with periods; and
- d. Revising paragraph (b).

The revision reads as follows:

217.7402 Exceptions.

* * * * *

(b) If the contracting officer determines that it is impracticable to adhere to the procedures of this subpart for a particular contract action that falls within one of the categories in paragraph (a)(1), (3), or (4) of this section, the contracting officer shall provide prior notice, through agency channels, electronically via email to the Principal Director, Defense Pricing and Contracting (Contract Policy), at *osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil*.

6. Revise section 217.7404 to read as follows:

217.7404 Limitations.

See PGI 217.7404 for additional guidance on obtaining approval to authorize use of an undefinitized contract action, documentation requirements, and other limitations on their use.

(a) *Foreign military sales contracts.*

(1) A contracting officer may not enter into a UCA for a foreign military sale unless—

(i) The UCA provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal; and

(ii) The contracting officer obtains approval from the head of the contracting activity to enter into a UCA in accordance with 217.7404-1.

(2) The head of the contracting activity may waive the requirements of paragraph (a)(1) of this section, if a waiver is necessary in order to support any of the following operations:

(i) A contingency operation.

(ii) A humanitarian or peacekeeping operation.

(b) *Unilateral definitization by a contracting officer.* Any UCA with a value greater than \$50 million may not be unilaterally definitized until—

(1) The earlier of—

(i) The end of the 180-day period, beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(ii) The date on which the amount of funds expended under the contractual action is equal to more than 50 percent of

the negotiated overall not-to-exceed price for the contractual action;

(2) The head of the contracting activity, without power of redelegation, approves the definitization in writing;

(3) The contracting officer provides a copy of the written approval to the contractor; and

(4) A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

7. Amend section 217.7404-3 by revising paragraph (a)(1) to read as follows:

217.7404-3 Definitization schedule.

(a) * * *

(1) The date that is 180 days after the contractor submits a qualifying proposal. This date may not be extended beyond an additional 90 days without a written determination by the head of the contracting activity without power of redelegation, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment that it is in the best interests of the military department or the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action; or

* * * * *

217.7404-5 [Amended]

8. Amend section 217.7404-5, paragraph (b) introductory text, by removing "217.7404-2" and adding "217.7404(a), 217.7404-2" in its place.

9. Amend section 217.7404-6 by-

a. Revising paragraph (a); and

b. In paragraph (b) removing "contract;" and adding "contract after negotiation of the final price;" in its place.

The revision reads as follows:

217.7404-6 Allowable profit.

* * * * *

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. However, if a contractor submits a qualifying proposal to definitize a UCA, and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal;

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